

RQ-832 Redacted
VIAL, HAMILTON, KOCH & KNOX, L.L.P.

A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS
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Opinion Committee
May 26, 1995

ATTORNEY-CLIENT PRIVILEGE
CONFIDENTIAL

COU - RHS

FILE # ML-33984-95

I.D. # 33989

VIA CERTIFIED MAIL NO. P 188 841 740

The Honorable Dan Morales
Attorney General
Supreme Court Building
Austin, Texas 78711-2548

Re: Request for Open Records Opinion

Dear General Morales:

As City Attorney for the City of Highland Village (the "City"), I would like to request a written decision regarding the propriety of public release of documents requested by Mr. Gene L. Pike. Specifically, by Memo received by the City on May 16, 1995, Mr. Pike requested the following documents: (see attached letter)

1. A copy of the detailed general ledger report for this fiscal year for professional services.
2. A copy of all invoices submitted to the city by Attorney Mark Houser and/or his firm.

Factual Background

The above Open Records requests are factually related to the series of events described as follows:

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In late March, 1994, _____, a patrol officer at the City of Highland Village, filed a variety of grievances and complaints with then Chief David Farrar. The allegations _____ from harassment, sexual harassment, unfair treatment, racial comments, and stalking. On April 11, 1994, _____ filed a charge with the Equal Employment Opportunity Commission, _____ citing discrimination based on sex under Title VII of the Civil Rights Act of 1964. The referenced complaints and grievances were investigated in an Internal Affairs Investigation and through the office of the City Manager. During the course of the Internal Affairs Investigation and the City Manager's grievance hearings, certain other information came to light warranting the City Council's initiation of a compliance audit investigation.

In May, 1994, the private firm of Parker-Jones, Inc. was engaged by the City Attorney to conduct the compliance audit. Each departmental employee was interviewed by employees of Parker-Jones, Inc. On June 3, 1994, Sergeant Boyd Raburn resigned from the City of Highland Village Police Department after being apprised of numerous personnel policy violations. On June 4, 1994, Chief David Farrar was terminated following a pre-termination hearing.

The compliance audit revealed that certain employees and individuals have given statements under oath concerning false statements on police certification applications to the Texas Commission on Law Enforcement Officer Standards and Education, statements concerning the distribution of certain evidence ordered by the Court to be destroyed, statements involving the theft of building materials from job-sites in the City, evidence of the improper impoundment of motor vehicles and the disposition thereof, statements concerning misconduct of a sexual nature, including unauthorized physical contact and sexually explicit language, statements involving the coercion of employees to execute documents, and evidence of the improper accounting and custody of physical evidence.

David Farrar, Sergeant Boyd Raburn, Detective Tony Simmons, and Sergeant Howard Stallcup filed suit on September 9, 1994 in State District Court in Denton County, Texas, seeking damages in excess of \$48,000,000.00 as well as reinstatement. The petition was amended on November 14, 1994 and again on February 23, 1995 (see enclosed copies). Claims of impropriety in conducting the audit have been alleged. The state court action was removed to federal court on March 22, 1995 wherein discovery has commenced.

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On July 22, 1994, Douglas A. Williams filed suit in Federal Court seeking damages in excess of the minimum jurisdictional limits of the Court (no monetary amount is mentioned in the Complaint) alleging harassment and discrimination under the Texas Whistleblower Act by Farrar and others (see enclosed copy of complaint).

Richard Spraker filed suit in State District Court in Denton County, Texas on May 4, 1995, which Petition seeks damages for wrongful termination in the amount of \$250,000.00 and employment reinstatement (see enclosed copy of petition).

The discovery phase of each case has commenced, and it is likely that the requested documents may be sought by Plaintiffs.

Requested Document (Item No. 1)

These documents have been provided to Mr. Pike.

Requested Documents (Item No. 2)

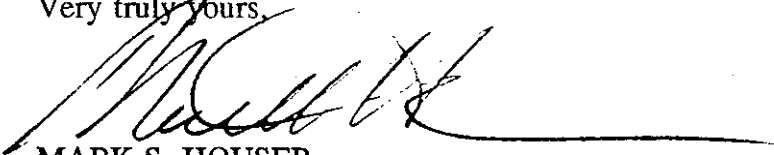
As to the requested documents in item No. 2, the City has furnished all billings not containing references to any of the parties or witnesses involved in pending or threatened litigation, those parties or witnesses being:

As to the remainder of the requested documents in item No. 2, the City asserts the Confidential Information Exception and the Litigation Exception pursuant to Sections 552.101 and 552.103 of the Government Code. See ORD-551. The items of activity detail in the bills contain confidential, privileged communications between attorney and client. Thus, the release of same will certainly compromise the City's position and strategy in the instant lawsuits. For these reasons, the City asserts the documents are exempt.

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Attorney General
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Should you have any questions or require further documentation, please feel free to call.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Mark S. Houser', followed by a long horizontal line extending to the right.

MARK S. HOUSER
MSH:bv
Enc.

cc: (less enclosures)
Mr. Bo McDaniel, City Manager
City of Highland Village
948 Highland Village Road
Highland Village, Texas 75067-6742



MEMO

TO: Paula Lawrence

FROM: Gene L. Pike


DATE: 05/15/95

SUBJECT: Document Request

Persuant to the Texas Open Meetings act please provide me with the following:

1. A copy of the detailed general ledger report for this fiscal year for professional services.
2. A copy of all invoices submitted to the city by Attorney Mark Houser and/or his firm.

Thank you.


Gene L. Pike

RQ-832

WOLFE CLARK & HENDERSON, L.L.P.

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FEB 28 1995

February 24, 1995

Opinion Committee

FILE #

RD-00832-95
AAL-32046-95

I.D. #

32046

The Honorable Dan Morales
State Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548

Re: Open Records Request to the City of Bonham

Dear General Morales:

On February 17, 1995, the City of Bonham and its officials received a request for records under the Open Records Act. A copy of this request by attorney Jeffrey L. Weinstein is attached as Exhibit "A". Prior to receiving this request for records, the City of Bonham and its officials received a Notice of Claim from attorney Jeffrey L. Weinstein which is attached as Exhibit "B". The City of Bonham believes that the records requested are exempted from disclosure under various subparagraphs of V.T.C.A., Govt. Code § 552. Pursuant to Govt. Code § 552.301, the City of Bonham and its officials request a decision from the Attorney General to determine whether this information is exempted under one or more of the exceptions.

Background

On June 17, 1994, Robert Kelly Dalton expired while at the Bonham City Jail. William Dalton, the deceased's father, was notified of the death. William Dalton called the City of Bonham and requested a copy of the autopsy report. An initial report was forwarded to William Dalton, and the final report was supplemented at a later time. These documents indicated suicide. If William Dalton's attorney seeks a second copy of such documents, they will be provided since they were previously released to his client. The autopsy report is not part of this request for an opinion. For further clarification, no items exist which are responsive to requests no. 3 and 4 for recordings and photographs.

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Settlement and Litigation

On December 15, 1994, the City of Bonham received a letter dated December 13, 1994 stating that Jeffrey L Weinstein, an attorney, represented Willie Dalton, Jr. and Norma Dalton, individually and as personal representatives of the Estate of Robert Kelly Dalton, in a claim for damages. The letter stated that damages were sustained as a result of the incarceration and death of Robert Kelly Dalton at the Bonham City Jail. (Exhibit B) This notification alleged that "the death occurred as a result of improper jail supervision" and indicated that other negligent acts or omissions may be made against "the city." (Exhibit B)

The December 13, 1994 letter also made a settlement demand based upon the death of Robert Kelly Dalton. (Exhibit B) The subsequent request for documents and information by Mr. Weinstein is related to the same incident upon which the settlement demand was based. Govt. Code § 552.103(a) excepts information from disclosure relating to "settlement negotiations". Here, the City of Bonham is party to settlement negotiations based upon this demand, and is authorized to deny the request for information. The requested information is directly related to the settlement demand as all arise out of the death of Robert Kelly Dalton.

In addition, the attorney's initial letter (Exhibit B) and the request in question (Exhibit A), both relate to litigation that is reasonably anticipated and will involve the City of Bonham and its officials. The request for records specifically refers to the "Notice of Claim Against the City of Bonham and Bonham Chief of Police Mike Bankston for Personal Injury - Wrongful Death." The request for records similarly notes that the records are requested so that the attorney can "represent [his] client in this matter." (Exhibit A) The initial letter even refers to "discovery" which suggests legal proceedings in which formal discovery will be pursued. (Exhibit B).

The exception established in Govt. Code § 552.103(a) authorizes a governmental entity to deny a request for information relating to anticipated litigation. Here, there is clearly an anticipation of litigation based upon the attorney's letters. Information relating to contemplated litigation must be sought through the judicial discovery process. Open Records Decision No. 551 (1990); Open Records Decision No. 108 (1975); See Texas Open Records Act Handbook, 1991, pp. 48-49. Even the letters by Mr. Weinstein acknowledge future discovery.

Judicial supervision of such discovery insures that the decisions regarding what information must be divulged during the course of suit, as well as the timing of such disclosure, will be

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made by the court that is responsible for the suit. The exception for settlement negotiations and litigation also prevents the use of the Open Records Act as a method to avoid proper discovery procedures. Texas Open Records Act Handbook, 1991, p. 48; Open Records Decision JM-1048 (1989).

Since all information and documents requested are reasonably related to a pending claim and anticipated litigation, no documents or information should be released, and same are exempt under Govt. Code § 552.103(a).

Specific Exceptions

As discussed above, it appears that all requests should be exempt at this time. Without waiving the above, the City of Bonham would show that additional exemptions apply to documents that have been requested.

Govt. Code § 552.101 exempts information that is confidential by law, either constitutional, statutory, or by a judicial decision. The Custodial Death Report (Exhibit "C") is not a public document or public information and has been held to be exempted from disclosure. Open Records Decision 521. If portions may be released, any such release must be limited to sections of information contained in SECTION I: GENERAL INFORMATION. Sections II, III, IV and V, along with the attachments to the Custodial Death Report, are confidential and privileged. Accordingly, the Custodial Death Report and all attachments are exempted from disclosure. Open Records Decision 521. C.C.P. 49.18.

Further, the criminal history information attached to the Custodial Death Report is exempted from disclosure as said information and services are statutorily protected. (Exhibit C) Govt. Code § 411.083 establishes that criminal history record information is confidential information. It would be improper and punishable to freely disseminate such information. Thus, under Govt. Code § 552.101, the criminal history is exempt. Similarly, request no. 5 appears to be a request for a criminal history report that is exempt from disclosure.¹ Further, any such information is still exempted by Govt. Code § 552.103(a). The information requested is for further representation by the attorney.

¹ A request for clarification has been made on item 5 to determine exactly what is requested. It appears that the request seeks a computerized criminal history summary which is exempted as discussed. Further response may be made after clarification. No waiver of the protection of Govt. Code § 552.108 is intended.

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The broad requests could also be interpreted to include any officer notes or investigative entries. To the extent such are sought, said entries are exempt under Govt. Code § 552.103(a) as discussed above. (Exhibit D) Further clarification will be requested on this issue.

I appreciate your consideration of the request for an opinion. If you would like additional information, any additional briefing, or other assistance, please let me know.

Thank you for your time and consideration.

Sincerely,


James C. Tidwell

JCT

Enclosures:

cc: (w/o enclosure)
Jeffrey L Weinstein